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Case No. CV 10-4059 JCG

MEMORANDUM OPINION AND ORDER

Defendant.

INTRODUCTION AND SUMMARY

On April 12, 2011, the parities submitted a detailed, 40-page joint stipulation (“Joint Stip.”). [Docket No. 18.]

1 In sum, having carefully studied, *inter alia*, the parties' joint stipulation and
2 the administrative record ("AR"), the Court concludes that, as detailed herein, the
3 Administrative Law Judge ("ALJ") inappropriately discounted Plaintiff's subjective
4 complaints about the severity of pain and her limitations. The Court remands this
5 matter to the Commissioner in accordance with the principles and instructions
6 enunciated in this Memorandum Opinion and Order.

7 II.

8 **PERTINENT FACTUAL AND PROCEDURAL BACKGROUND**

9 Plaintiff, who was 47 years old on the date of her administrative hearing, does
10 not speak or write English, completed third grade as her highest level of education,
11 and has no special job training. (*See* AR at 35, 38, 94, 100.)

12 On September 11, 2006, Plaintiff filed for DIB and SSI, alleging that she has
13 been disabled since August 1, 2005 due to diabetes, arthritis, weakness in her
14 shoulder, severe dysfunction of right dominant upper extremity, inability to stay on
15 her feet, and difficulty in sustaining and changing postural positions. (*See* AR at 95,
16 130.)

17 On March 4, 2008, Plaintiff, represented by counsel, appeared and testified at
18 a hearing before an ALJ. (*See* AR at 37-44.) The ALJ also heard testimony from
19 Steven Berry, a vocational expert ("VE"). (*Id.* at 44-45.)

20 On March 26, 2008, the ALJ denied Plaintiff's request for benefits. (AR at
21 13-18.) Applying the well-known five-step sequential evaluation process, the ALJ
22 found, at step one, that Plaintiff has not engaged in substantial gainful activity since
23 her alleged onset date. (*Id.* at 15.)

24 At step two, the ALJ found that Plaintiff suffers from severe impairments
25 consisting of "status post right shoulder subacromial decompression, degenerative
26 cervical and lumbar disc disease, carpal tunnel syndrome, diabetes mellitus, a history
27 of cardiac catheterization, and morbid obesity." (AR at 15.)

28 At step three, the ALJ determined that the evidence did not demonstrate that

1 Plaintiff's impairments, either individually or in combination, meet or medically
2 equaled the severity of any listing set forth in the Social Security regulations.^{1/} (AR
3 at 15.)

4 The ALJ then assessed Plaintiff's residual functional capacity^{2/} ("RFC") and
5 determined that she can perform light work with limitations. (AR at 16.)
6 Specifically, the ALJ found Plaintiff cannot do more than occasional overhead
7 reaching with "her bilateral upper extremities." (*Id.*)

8 The ALJ found, at step four, that Plaintiff has the ability to perform her past
9 relevant work as a machine operator and a machine operator/inspector. (AR at 18.)
10 Thus, the ALJ concluded that Plaintiff was not suffering from a disability as defined
11 by the Act. (*Id.* at 13, 18.)

12 Plaintiff filed a timely request for review of the ALJ's decision, which was
13 denied by the Appeals Council. (AR at 1-3, 68.) The ALJ's decision stands as the
14 final decision of the Commissioner.

15 III.

16 STANDARD OF REVIEW

17 This Court is empowered to review decisions by the Commissioner to deny
18 benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security
19 Administration must be upheld if they are free of legal error and supported by
20 substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001, *as*
21 *amended* Dec. 21, 2001). If the court, however, determines that the ALJ's findings
22

23 ^{1/} See 20 C.F.R. pt. 404, subpt. P, app. 1.

24 ^{2/} Residual functional capacity is what a claimant can still do despite existing
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155
26 n. 5 (9th Cir. 1989). "Between steps three and four of the five-step evaluation, the
27 ALJ must proceed to an intermediate step in which the ALJ assesses the claimant's
28 residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151 n. 2 (9th
Cir. 2007).

1 are based on legal error or are not supported by substantial evidence in the record,
2 the court may reject the findings and set aside the decision to deny benefits.
3 *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*,
4 242 F.3d 1144, 1147 (9th Cir. 2001).

5 “Substantial evidence is more than a mere scintilla, but less than a
6 preponderance.” *Aukland*, 257 F.3d at 1035. Substantial evidence is such “relevant
7 evidence which a reasonable person might accept as adequate to support a
8 conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276 F.3d
9 at 459. To determine whether substantial evidence supports the ALJ’s finding, the
10 reviewing court must review the administrative record as a whole, “weighing both
11 the evidence that supports and the evidence that detracts from the ALJ’s
12 conclusion.” *Mayes*, 276 F.3d at 459. The ALJ’s decision “‘cannot be affirmed
13 simply by isolating a specific quantum of supporting evidence.’” *Aukland*, 257 F.3d
14 at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th Cir. 1998)). If the
15 evidence can reasonably support either affirming or reversing the ALJ’s decision,
16 the reviewing court “‘may not substitute its judgment for that of the ALJ.’” *Id.*
17 (quoting *Matney ex rel. Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)).

18 IV.

19 ISSUES PRESENTED

20 Two issues are presented here:

- 21 1. whether the ALJ properly evaluated the medical evidence, (*see* Joint
22 Stip. at 3-29); and
- 23 2. whether the ALJ properly assessed Plaintiff’s credibility. (Joint Stip. at
24 30-40.)

25 Under the circumstances here, the Court finds the issue of Plaintiff’s
26 credibility to be dispositive of this matter, and does not reach the remaining issue.

1 V.

2 **DISCUSSION AND ANALYSIS**

3 Plaintiff argues that the ALJ's decision discounting Plaintiff's complaints
4 "lacks the requisite support of substantial evidence and is [the] result of legal error."
5 (Joint Stip. at 31, 32.) Plaintiff also contends that "[t]here is objective evidence of
6 impairment and several physicians have opined greater limitations than found by the
7 ALJ[.]" (*Id.* at 32.)

8 Defendant counters that substantial evidence does, in fact, exist to support the
9 ALJ's decision. (Joint Stip. at 37.) Defendant also contends that Plaintiff's
10 condition could be controlled by medication. (*Id.* at 36.) Finally, Defendant argues
11 that Plaintiff exaggerated her symptoms. (*Id.*)

12 A. The ALJ Must Provide Clear and Convincing Reasons for Discounting
13 Plaintiff's Subjective Complaints

14 Plaintiff, of course, carries the burden of producing objective medical
15 evidence of his or her impairments and showing that the impairments could
16 reasonably be expected to produce some degree of the alleged symptoms. *Benton ex*
17 *rel. Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). But once a plaintiff
18 meets that burden, medical findings are not required to support the alleged severity
19 of pain. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (*en banc*); *see also*
20 *Light v. Soc. Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997, *as amended* Sept. 17,
21 1997) ("[A] claimant need not present clinical or diagnostic evidence to support the
22 severity of his pain.") (internal citation omitted).

23 Under these circumstances, an ALJ can then reject a plaintiff's subjective
24 complaint "only upon (1) finding evidence of malingering, or (2) expressing clear
25 and convincing reasons for doing so." *Benton*, 331 F.3d at 1040. The ALJ may
26 consider the following factors in weighing a plaintiff's credibility:

- 27 (1) his or her reputation for truthfulness;
28 (2) inconsistencies either in the plaintiff's testimony or between the plaintiff's

1 testimony and his or her conduct;
2 (3) his or her daily activities;
3 (4) his or her work record; and
4 (5) testimony from physicians and third parties concerning the nature,
5 severity, and effect of the symptoms of which she complains. *Thomas v. Barnhart*,
6 278 F.3d 947, 958-59 (9th Cir. 2002).

7 Here, the ALJ did not find evidence of malingering. (*See generally* AR at 13-
8 18.) Thus, the ALJ's reasons for rejecting Plaintiff's credibility must rest on clear
9 and convincing reasons. *See Benton*, 331 F.3d at 1040. "General findings are
10 insufficient; rather, the ALJ must identify what testimony is not credible and what
11 evidence undermines the claimant's complaints." *Lester v. Chater*, 81 F.3d 821, 834
12 (9th Cir. 1995, *as amended* April 9, 1996); *Reddick*, 157 F.3d at 722.

13 B. Plaintiff's Subjective Complaints

14 At the March 4, 2008 hearing, Plaintiff testified that she has "a lot of pain in
15 [her] hands." (AR at 39.) She also stated that "[t]here's a lot of numbness" in her
16 hands. (*Id.*) Plaintiff said that she has worn braces on both hands for about a year
17 because when she was not wearing them "[her hands] hurt more or there's
18 tingleness." (*Id.* at 40.) Plaintiff said that she had not had surgery on her hands
19 because her doctor told her that while he could operate he could not guarantee that
20 she would come out in "good shape." (*Id.*) Plaintiff reported that "[w]hen [she]
21 wake[s] up in the morning [she] feel[s] [her] arms and hands, they're like very tired
22 like if [she] had done strenuous work." (*Id.* at 41.)

23 Plaintiff also said that she suffered from diabetes which caused kidney
24 infections. (AR at 40.) Plaintiff continued by saying that "[her] feet are numb quite
25 often and they hurt a lot." (*Id.*)

26 Plaintiff talked about having surgery on her right shoulder. (AR at 39, 40.)
27 Plaintiff said that the surgery "helped a little, but [her shoulder] still hurts a lot." (*Id.*
28 at 40.) Plaintiff stated that she was still limited in her movements after the surgery

1 because “[t]he doctor said I could [reach overhead] - - if I do that it has to be very
2 light because the tendons could snap off or break.” (*Id.*)

3 Plaintiff testified that she had problems sitting and standing. (AR at 41.)
4 Plaintiff extrapolated by saying that after twenty minutes of sitting her hips hurt and
5 when she stands immediately afterwards her feet hurt. (*Id.*) Plaintiff explained that
6 it takes her about five to ten minutes before she starts to feel better. (*Id.*) Plaintiff
7 also testified that she can only tolerate standing for “about half an hour.” (*Id.*)
8 Plaintiff added that she cannot “be in one position. [She has] to be switching from
9 one to the other[.]” (*Id.* at 42.)

10 The ALJ asked Plaintiff if she was able to move around at work, to sit and
11 stand as needed, would she then be able to work. (AR at 42.) Plaintiff replied “[i]f I
12 didn’t have to lift anything with my hands or use my hands.” (*Id.*) Plaintiff
13 expounded by saying that, at most, she was capable of lifting a gallon of milk,
14 although it was difficult for her to do so. (*Id.*) Plaintiff said that she has difficulty
15 opening bottles or jars. (*Id.* at 43.)

16 Plaintiff testified that she is able to perform light chores around the house.
17 (AR at 42.) Plaintiff said that while her daughters-in-law do most of the chores, she
18 sometimes helps “with washing the dishes or maybe cutting something for cooking.”
19 (*Id.*)

20 With respect to her daily activities, Plaintiff stated, “I go outside and I walk a
21 little, I go outside and I throw the trash out, come back in and maybe wash some
22 dishes, I’ll fold some clothes.” (AR at 42.)

23 C. ALJ’s Purported Reason(s) for Discounting Plaintiff’s Credibility

24 In rejecting Plaintiff’s credibility, the ALJ summarized Plaintiff’s testimony
25 and found that Plaintiff’s “medically determinable impairments could reasonably be
26 expected to produces some symptoms, but that [Plaintiff’s] statements concerning
27 the intensity, persistence and limiting effects of these symptoms are not entirely
28 credible.” (AR at 17.)

1 The ALJ also concluded that “the objective medical evidence does not
2 document medical findings consistent with the extreme limitations alleged by
3 [Plaintiff].” (AR at 17.)

4 The ALJ said that “[t]here are no reports of persistent abnormalities of gait
5 and station, or other physical abnormalities consistent with complaints of back
6 pain.” (AR at 17.)

7 The ALJ found that two factors weighed against Plaintiff’s alleged difficulty
8 with basic living. (AR at 17.) First, the ALJ said that Plaintiff’s “allegedly limited
9 daily activities cannot be objectively verified with any reasonable degree of
10 certainty.” (*Id.*) Second, the ALJ said that even if Plaintiff’s limitations were true,
11 “it is difficult to attribute that degree of limitation to [Plaintiff’s] medical condition,
12 as opposed to other reasons[.]” (*Id.*)

13 Finally, the ALJ said that the evidence failed to show Plaintiff required on-
14 going treatment since May 2007. (AR at 17.) The ALJ reasoned that “if [Plaintiff]
15 suffered from disability pain, she would have been receiving on-going medical
16 care.” (*Id.*)

17 D. ALJ Improperly Discounted Plaintiff’s Credibility

18 After a careful review of the medical record and the parties’ papers, the Court
19 has considered the ALJ’s reasons for finding Plaintiff not credible, and concludes
20 that the ALJ’s reasons are not clear and convincing and/or supported by substantial
21 evidence. Four reasons guide this Court’s determination.

22 First, the ALJ erred to the extent he rejected Plaintiff’s credibility based on a
23 lack of objective medical evidence. (*See* AR at 17.) Plaintiff provided sufficient
24 medical evidence of underlying impairments that were reasonably likely to cause the
25 symptoms she described. For instance:

26 1. An evaluation, dated September 11, 2006, reported Plaintiff had “a right
27 shoulder subacromial decompression with poly somatic complaints non related to
28 her surgery.” (AR at 180.)

1 2. An evaluation, dated October 6, 2006, reported that Plaintiff has
2 “diabetes mellitus or oral hypoglycani [sic]” for six years and that Plaintiff had
3 visited the doctor every one to two months. (AR at 195.)

4 3. A treatment note, dated September 5, 2006, reported that Plaintiff had a
5 “rotator cuff tear [right] shoulder.” (AR at 199-200.) The same note reported that
6 Plaintiff was “unable to push/pull/lift any object/weights [with] the [right] hand/arm
7 heavier than 1-2 [pounds]. Unable to do repetitive bending, prolonged sitting or
8 standing longer than 30-60 mins.” (*Id.* at 200.) It also indicated that Plaintiff could
9 only sit, stand, or walk for less than one hour in a work day. (*Id.*)

10 4. An evaluation note, dated August 8, 2006, diagnosed Plaintiff with
11 “[m]ultilevel spondylosis involving the upper lumbar spine with facet hypertrophy
12 involving the lower lumbar spine.” (AR at 205.)

13 5. A treatment note, dated August 7, 2006, indicated Plaintiff complained
14 about lower back pain for at least four days after falling in the shower. (AR at 206.)

15 6. An MRI report, dated April 28, 2006, showed that Plaintiff had a
16 “partial tear formation of the supraspinatus tendon distally. . . [n]oticable
17 hypertrophic DJD of the AC joint . . . some intrasubstance degeneration of the
18 labra.” (AR at 222.)

19 7. A treatment note, dated April 19, 2006, noted that Plaintiff was
20 complaining of neck and head pain. (AR at 229.)

21 8. A cervical spine examination note, dated December 28, 2005, showed that
22 Plaintiff had “straightening of the cervical lordiosis.” (AR at 243.)

23 9. A treatment note, dated December 27, 2005, reported that Plaintiff was
24 complaining of pain in her right leg that had lasted multiple days. (AR at 244.)

25 10. A treatment note, dated September 16, 2005, stated that Plaintiff had
26 pain in her neck, right shoulder and hand. (AR at 251.)

27 11. A treatment note, dated July 19, 2005, indicated that Plaintiff had pain in
28 her legs and numbness on the left side of her face for about a week. (AR at 254.)

1 12. An internal medicine evaluation, dated November 22, 2006, showed that
2 Plaintiff had “tenderness in the area of the left sciatic notch” and the straight leg
3 raise test was “positive on the left side and some reflex discrepancy and sensory
4 impairment was noted.” (AR at 289.)

5 13. An examination report, dated May 16, 2007, concluded that Plaintiff
6 has “severe back pain and suffers from radiculopathy from the hip and down with
7 cramping and pain in her legs and calves[.]” (AR at 292.) The report also said that
8 Plaintiff had lumbar disc disease and intense pain in her hands and wrists. (*Id.*)

9 14. An examination report, dated May 16, 2007, diagnosed Plaintiff with “a
10 combination of severe tunnel pain and numbness and cramping of her hand . . . the
11 carpal tunnel syndrom is quite severe on the right [hand], but borderline on the left.”
12 (AR at 293.)

13 The ALJ rejected Plaintiff’s testimony regarding her subjective complaints
14 because the “medical evidence does not document . . . findings consistent with the
15 extreme limitations alleged by [Plaintiff].” (AR at 17.) Because Plaintiff produced
16 sufficient medical evidence of underlying impairments that are likely to cause
17 difficulty standing and sitting, difficulty using her hands, and back pain, Plaintiff
18 met her burden and medical findings are not required to support the alleged *severity*
19 of her complaints. *See Bunnell*, 947 F.2d at 345; Social Security Ruling (“SSR”) 96-
20 7P,^{3/} 1996 WL 374186, at *1 (“An individual’s statements about the intensity and
21 persistence of pain or other symptoms or about the effect the symptoms have on his
22

23 ^{3/} “The Commissioner issues Social Security Rulings [(“SSRs”)] to clarify the
24 Act’s implementing regulations and the agency’s policies. SSRs are binding on all
25 components of the SSA. SSRs do not have the force of law. However, because they
26 represent the Commissioner’s interpretation of the agency’s regulations, we give
27 them some deference. We will not defer to SSRs if they are inconsistent with the
28 statute or regulations.” *Holohan v. Massanari*, 246 F.3d 1195, 1203 n. 1 (9th Cir.
2001) (internal citations omitted).

1 or her ability to work may not be disregarded solely because they are not
2 substantiated by objective medical evidence.”).

3 Second, the ALJ rejected Plaintiff’s credibility because her “limited daily
4 activities cannot be objectively verified.” (AR at 17.) Such a standard imposes “an
5 extremely heavy, and unwarranted, burden on the Plaintiff.” *Haller v. Astrue*, 2008
6 WL 4291448, at *5 (E.D. Cal. Sept. 18, 2008). Social Security regulations state that
7 a claimant’s statements about daily activities will be evaluated in relation to the
8 objective medical record. *See* 20 C.F.R. § 404.1529(c)(4) (amended in other
9 sections); *see also Haller*, 2008 WL 4291448, at *5 (explaining that ALJ must cite
10 authority in order to prove that Plaintiff is “required to offer objective verification,
11 to a reasonable degree of certainty, regarding his activities of daily living”); *see also*
12 *Lester*, 81 F.3d at 834 (“General findings are insufficient; rather, the ALJ must
13 identify what testimony is not credible and what evidence undermines the claimant’s
14 complaints.”).

15 Third, the ALJ was not convinced that Plaintiff’s limitations stemmed from
16 her medical condition “as opposed to other reasons.” (AR at 17.) This reason is not
17 “specific, clear and convincing.” *Berkelhammer v. Astrue*, 2009 WL 416037, at *3
18 (C.D. Cal. Feb. 19, 2009) (an ALJ’s rejection of claimant’s credibility because a
19 claimant’s limits may come from unspecified other reasons is not a clear and
20 convincing reason to reject claimant’s testimony). The ALJ did not specify what
21 other reasons could be responsible for Plaintiff’s limitations. *See* SSR 96-7p, 1996
22 WL 374186, at *4 (stating that “it is not sufficient to make a conclusory statement”
23 and that an ALJ “must be sufficiently specific to make clear to the individual and to
24 any subsequent reviewers the weight the adjudicator gave to the individual’s
25 statements and the reasons for that weight”); *see also McAllister v. Sullivan*, 888
26 F.2d 599, 603 (9th Cir. 1989, *as amended* Oct. 19, 1989) (explaining that an ALJ’s
27 conclusions cannot be too broadly stated to be acceptable).

28 Finally, the ALJ rejected Plaintiff’s testimony because “the documentary

1 evidence fails to show that the claimant has required on-going treatment since May
2 2007.” (AR at 17.) Plaintiff’s last medical record is from Salvatore A. Danna, M.D.
3 (“Dr. Danna”) on May 16, 2007. (*Id.* at 292.) In that report, Dr. Danna reported
4 “[f]ollowup will be in two months.” (*Id.*) Although the further treatment of Plaintiff
5 is unknown, it does suggest the ALJ’s going-forward assumption could be
6 inaccurate. *See Berkelhammer*, 2009 WL 416037, at *4 (holding that records
7 showing a claimant was scheduled to have surgery was sufficient to disprove ALJ’s
8 assumption that claimant had not sought additional treatment). However, the
9 hearing was held in March 2008, well after Plaintiff should have had her follow-up
10 appointment with Dr. Danna. (AR at 37-44, 292.) Plaintiff argued that the lack of
11 treatment records after 2007 was “a clerical rather than a substantive issue.” (Joint
12 Stip. at 34.) Defendant did not address this argument. (*See id.* at 35-38.) The ALJ
13 shall obtain additional information and clarification regarding Plaintiff’s medical
14 treatment received after May 2007.

15 VI.

16 **REMAND IS APPROPRIATE**

17 This Court retains discretion to remand or reverse and award benefits.
18 *McAllister*, 888 F.2d at 603. Where no useful purpose would be served by further
19 proceedings, or where the record has been fully developed, it is appropriate to
20 exercise this discretion to direct an immediate award of benefits. *See Benecke v.*
21 *Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172,
22 1179-80 (9th Cir. 2000, *as amended* May 4, 2000), *cert. denied*, 531 U.S. 1038
23 (2000). Where there are outstanding issues that must be resolved before a
24 determination can be made, and it is not clear from the record that the ALJ would be
25 required to find plaintiff disabled if all the evidence were properly evaluated, remand
26 is appropriate. *See Benecke*, 379 F.3d at 595-96; *Harman*, 211 F.3d at 1179-80.

27 Here, there are outstanding issues which must be resolved before a final
28 determination can be made. On remand, the ALJ shall reconsider Plaintiff’s

1 subjective complaints and the resulting functional limitations, and either credit
2 Plaintiff's testimony or provide clear and convincing reasons supported by
3 substantial evidence for rejecting them. In addition, if necessary, the ALJ shall
4 obtain additional information and clarification regarding Plaintiff's functional
5 limitations. The ALJ shall reassess the medical opinions in the record and provide
6 sufficient reasons under the applicable legal standard for rejecting any portion of the
7 medical opinions. The ALJ shall then proceed through steps four and five to
8 determine what work, if any, Plaintiff is capable of performing.^{4/}

9 Based on the foregoing, IT IS ORDERED THAT judgment shall be entered
10 **REVERSING** the decision of the Commissioner denying benefits and
11 **REMANDING** the matter for further administrative action consistent with this
12 decision.

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15 Dated: May 9, 2011



Hon. Jay C. Gandhi
United States Magistrate Judge

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28 ^{4/} In light of the Court's remand instructions, it is unnecessary for the Court to
address Plaintiff's remaining contentions. (See Joint Stip. at 3-29.)